to a considerable extent acting under the influence of the second appellant. He did not benefit in any way, financially or otherwise, from these misappropriations and it seems probable that had he gone to the executive council of the union for authority before making these advances or loans to the second appellant the requisite authority would have been forthcoming. Taking all these factors into consideration I think justice would be served if a fine only is imposed on him. I accordingly dismiss his appeal against his convictions on the two charges against him but set aside the sentences of imprisonment and substitute instead a fine of $1,000 in respect of each charge.

So far as the second appellant is concerned the question of sentence presents more difficulty. The trial judge has found that he has rendered useful services to the Singapore Harbour Board Staff Association and is a very able trade union leader. He has when the association was in lean times helped it financially by not drawing his salary for a period of seven months. He has also made full restitution before the trial commenced.

Taking all these factors into consideration and in the particular circumstances of the case and after very anxious consideration I am of the opinion that the interests of justice will be served if I err on the side of mercy and leniency. I will therefore dismiss his appeal against conviction but will set aside the sentences of imprisonment and substitute therefor a fine of $1,500 in respect of the 1st charge and a fine of $2,000 in respect of the second charge.

*Convictions confirmed. Sentences of imprisonment set aside. Fines imposed.*

---

## SIBU URBAN DISTRICT COUNCIL v. LING KIM CHING

**[O.C.J. (Lee Hun Hoe J.C.) December 1, 1964]**

**[Sibu — Civil Suit No. CS/66/64]**

*Contract — Agreement to run a canteen — Whether agreement created a licence or a tenancy — Determination.*

*Landlord and Tenant — Licence — Protection of Rent Control Ordinance.*

The plaintiff and the defendant entered into an agreement whereby the plaintiff allowed the defendant to run a canteen at a swimming pool for a period of twelve months. The canteen was run in the plaintiff's premises. Subsequently it appeared that the defendant failed to pay the rent and the plaintiff terminated the agreement by giving a month's notice.

**Held:** (1) the agreement created a licence and not a tenancy and as this had been properly terminated, the defendant should be asked to give up possession of the premises;

(2) even if the agreement created a tenancy the defendant could not claim the protection of the Rent Control Ordinance as the agreement was outside the ambit of the Ordinance.

*Cases referred to:—*

(1) *Chin Chak* v. *Fan Kee alias Tan Kee Chung* [1958] S.C.R. 121.

(2) *Brooker* v. *Palmer* [1942] 2 All E.R. 674.

CIVIL SUIT.

*Secretary of Sibu Urban District Council* for the plaintiff.

Defendant in person.

**Lee Hun Hoe J.C.:** Plaintiff is the Sibu Urban District Council, a corporate body constituted under the provisions of the Local Authority (Sibu Urban District Council) Order 1957 (see G.N.L. 97 of 1957). The Local Authority (Sibu Urban District Council) Order which came into operation on the 1st July 1963 and published in the Laws of Sarawak 1963, volume XI, is a modified version of G.N.L. 97 of 1957 (as amended by G.N.L. 60 and L. 110 of 1959).

Plaintiff and defendant entered into an agreement whereby plaintiff allowed the defendant to run a canteen at the Bukit Lima Swimming Pool, Sibu for a period of 12 months i.e. from 16th November, 1963 to 15th November, 1964. The agreement was registered as Sibu Deed No. 477/63. The agreement was subjected to the following terms and conditions:—

"(a) The canteen shall be run in the temporary canteen building to be erected by the council for the 1st approximately six months and when the proper canteen building is completed the contractor shall move into the permanent building for the 2nd six months.

(b) Before signing this agreement, the contractor shall pay to the council a quarterly rental ($480.00) in advance within 7 days of each quarter during the period of this agreement. No refund shall be made if the contractor does not wish to continue running the canteen.

(c) The contractor shall operate the canteen in accordance with all the health requirements as directed by the council and shall take out separate licence on payment of the appropriate fee if he wishes to trade in food or other goods as well as for the canteen.

(d) The contractor shall not assign or sublet either wholly or in part the undertaking of this agreement without the prior consent in writing of the chairman of the council.

(e) The contractor shall be responsible to pay the water rate and electric lighting charges, but the capital cost of installation of water and lights will be borne by council.

(f) The contractor shall provide his own refrigerator, sufficient tables and chairs, utensils and kitchen equipment for the running of the canteen. An extra five cents to ten cents higher than the price in the town be allowed. The contractor shall submit a price list to the council for approval. The council reserves the right to fix prices of food and drink if necessary.

(g) The contractor shall run the business daily on week days from 2 p.m. to 9 p.m. and Sundays and public holidays from 8 a.m. to 9 p.m. and such time as approved by the council.

(h) If the contractor fails to carry out any or all of the above agreement, the council has the right to cancel this agreement.

(i) Should either party wish to terminate this contract, one month's notice in writing must be given by the contractor to the council through the secretary, or by the secretary on behalf of the council to the contractor as the case may be, during the currency of this agreement."

There is no dispute about the rents for the 1st and 2nd quarters. They were paid promptly. In fact the 1st quarter rent was paid on 26th October, 1963. It is not clear when the agreement was signed by the various signatories. It is also not clear when the agreement was registered. Paragraph (b) of the terms and conditions of the agreement was badly drafted. It is probable that the rent for the first quarter was paid before the agreement was signed. Therefore the clause should have stated that before the signing of this agreement the contractor should pay to the council the first quarter of rental of $480 and thereafter he should pay to the council $480 in advance within 7 days of each quarter during the period of the agreement.

The canteen was run in the plaintiff's premises. It seems that payment for the 3rd quarter rent was not made within the seven days of that quarter. So on 23rd May, 1964 plaintiff gave defendant a month's notice to terminate the contract with effect from the same date (Exhibit P.8). On 31st July, 1964 plaintiff purported to give notice to defendant to cease trading and to move his goods out from the canteen (Exhibit P.9). Defendant did nothing but continued with his business. Had plaintiff forcibly ejected defendant out of the premises defendant would certainly be entitled to claim substantial damages. However plaintiff probably realised that the notice (Exhibit P.8) was bad and the notice (Exhibit P.9) was not worth the paper it was written on. So on 8th August, 1964 plaintiff wrote to defendant (Exhibit P.4) informing the latter that he had breached paragraph (b) of the terms and conditions of the agreement. At the same time gave defendant a month's notice to vacate the premises. The validity of this notice was not raised. In the concluding paragraph of the letter defendant was given notice to pay the rent of $480 for the 3rd quarter within 7 days on receipt of the letter. On 11th August, 1964 defendant wrote to plaintiff (Exhibit P.5) enclosing a cheque for $240 purporting to cover the rent for the 3rd quarter. After the expiration of the notice plaintiff took action alleging that defendant was in arrears of rent for the 3rd quarter and prayed for an order of possession and mesne profits.

It has not been disputed that on 15th July, 1964 plaintiff called for 2nd tender to run the canteen. Clearly plaintiff anticipated that defendant would vacate the canteen because of the letter (Exhibit P.8). Although plaintiff has someone in mind it has not as yet awarded the tender to anyone. Plaintiff could not do this until defendant leaves the premises. Defendant explained that he paid $240 for the 3rd quarter because his sister-in-law had tendered for $80 per month in the 2nd tender. He said she was successful. There is no evidence to support this claim. In fact this is not true from what was said by P.W.1, the secretary of the Sibu Urban District Council. Even assuming that his sister-in-law was the successful tenderer I cannot see how he could claim the right to pay $80 per month. That his sister-in-law is a member of his family is irrelevant. He was there to run the canteen by virtue of the agreement and was bound to pay the rental in accordance with the terms and conditions of the agreement.

In his defence defendant alleged that plaintiff had breached paragraphs (a) and (g) of the terms and conditions of the agreement. I find that there is no substance in both his allegations. First, defendant expected as of right to be provided with a permanent canteen building for the 2nd six months of the agreement. No such undertaking had been given by the plaintiff. Paragraph (a) of the agreement is clear and says that "When the proper canteen building is completed" defendant shall move into the permanent building for the 2nd six months. P.W.1. told the court that due to circumstances beyond the control of the council the building could not be completed within the period anticipated. At any rate there is nothing in the agreement to show that defendant is entitled as of right to be provided with a permanent building. Secondly, defendant alleged that plaintiff had breached paragraph (g) of the agreement. His argument, if I understand him correctly, is that the opening hours for the public to the swimming pool is half an hour late on weekdays and an hour late on Sundays and holidays as compared with the commencing hours of his business therefore there was a breach of the agreement. Opening hours for the public to the swimming pool on weekdays is 2.30 p.m. and on Sundays and holidays 9 a.m. Whereas under the agreement defendant had to run his business on weekdays from 2 p.m. to 9 p.m. and on Sundays and holidays from 8 a.m. to 9 p.m. and such time as approved by the council. A considerable number of council staff worked at the swimming pool and the canteen also catered for them. No doubt if the public could be admitted earlier defendant would have more business. But it was not a term of the agreement that plaintiff should facilitate defendant on the question of opening hours to the public. Plaintiff is under no obligation to alter the opening hours for the public to the swimming pool to enhance the business of defendant. Defendant has failed to show that plaintiff had

in any way altered the time under which defendant agreed to run his business. There is nothing to indicate that paragraph (g) had in any way been breached.

Defendant made no complaint about the opening hours for the public to the swimming pool until 27th April, 1964 when he wrote to plaintiff claiming for indemnity of $130 per month for loss of business. P.W.1 said that council did not reply to defendant's claim because it was so unreasonable. Defendant counterclaimed for $780 at $130 per month for the period 16th November, 1963 to 15th May, 1964. The basis of his counterclaim relates to the opening hours for the public to the swimming pool not being similar to the commencing hours of his business and thereby he suffered loss. I have already dealt with this previously and I do not intend to comment further except to say that defendant has failed to establish his counterclaim on the balance of probability. In my opinion his counterclaim has no merit at all.

Both parties are not represented by counsel. Plaintiff is represented by P.W.1 and defendant appeared in person. In my view it would be advisable for the council to get counsel to appear on its behalf in matter of this nature. Interesting and difficult points of law have not been argued as they should have been.

Had the agreement between the parties created a tenancy or a licence? This question was fully discussed in *Chin Chak* v. *Fan Kee alias Tan Kee Chuang.*(1) In that case at page 127 Williams C.J. said:—

"Whether or not parties intend to create as between themselves the relationship of landlord and tenant is in the last resort a question of intention. Indeed the decisive consideration is the question of intention — *Brooker* v. *Palmer.*(2) The intention must here be ascertained from the nature of the written agreement and other facts of the case."

I understand that the agreement was signed by the parties after defendant successfully tendered to run the canteen. The purpose of the agreement is clear. Plaintiff allowed defendant to run a canteen at the Bukit Lima Swimming Pool for 12 months under certain terms and conditions. The canteen was to be run in a temporary building to be erected by plaintiff and when a permanent building was completed then in such building. In consideration defendant was to pay rental of $480 quarterly. Each party might terminate the agreement by giving the other a month's notice. The receipts issued by plaintiff mentioned quarterly rent and canteen rent. All these matters are no more consistent with a tenancy than a licence. Each case must be decided according to its particular facts.

It is significant that in the agreement defendant was referred to as the contractor. I consider that to enable the contractor, defendant in this case, to run the canteen plaintiff undertook to provide him with a place to do his business. In order to do so plaintiff granted defendant a licence. The agreement was framed for a fixed period and for a fixed unvarying payment. It was an ordinary commercial bargain. The licence was necessary in relation to the use of the premises as it would permit the licensee to do something which would otherwise be a trespass by him. *Halsbury's* Laws of England, 3rd Edition, Vol. 23, page 429 para. 1025 reads:—

"A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof, or the circumstances and conduct of the parties show that all that was intended was the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a licence, even though the agreement may employ words appropriate to a lease."

In my view in this case the agreement merely created a licence. The licence was for a limited purpose and for a limited time and for valuable consideration. In which case if defendant remained after his licence was properly terminated he became a trespasser.

Even if I am wrong in holding that the agreement created a licence and not a tenancy the result will be the same in that on the expiration of the notice (Exhibit P.4.) which I hold to be valid the licence or the tenancy was properly terminated. Further, without any notice the agreement lapsed on the 15th November, 1964 by effluxion of time. Even if the agreement created a tenancy defendant could not claim protection under the provisions of the Rent Control Ordinance since it is outside the ambit of the said Ordinance.

Defendant alleged that he wanted to pay the rent of $480 to plaintiff but a clerk of the council refused to accept the money. D.W.2 (defendant's brother) supported defendant. P.W.1 denied the allegation. I find it difficult to believe defendant and D.W.2. Because when plaintiff demanded for the rent of the 3rd quarter defendant paid $240 by cheque. One would have thought that if he was ready and willing to pay the rent of $480 when not demanded the more so would he be prepared to pay the amount when specifically demanded. Undoubtedly part of the rent was in arrear at the expiration of the the notice (Exhibit P.4).

Defendant is only 18 years of age and seems to have a stubborn attitude. Had he approached the matter properly without antagonizing anyone plaintiff would probably extend the agreement to run the canteen in view of the capital expenditure defendant had incurred in running the canteen. I have considerable sympathy for

defendant but he had himself brought about the unfortunate position he found himself in. He signed the agreement with open eyes and there is nothing to indicate that he was not aware of its terms and conditions. Between the plaintiff and defendant I have no hesitation in accepting the evidence of the plaintiff.

For reasons given I give judgment on the claim for plaintiff with costs. I dismiss the defendant's counterclaim with costs. Defendant must vacate the premises at the Bukit Lima Swimming Pool, Sibu. He is entitled to a reasonable time for removing his property and winding up his business. Defendant is ordered to vacate from the premises on or before 31st December, 1964. Defendant is further ordered to pay the licence fee at the rate of $160 per month up to 30th September, 1964 less amount already paid and damages at the rate of $160 per month up to the time he vacates the premises.

*Claim allowed. Counter-claim dismissed.*

---

## LEE YUNG KIANG v. LING YUN TIE

**[O.C.J. (Lee Hun Hoe J.C.) December 12, 1964]**

**[Kuching — Matrimonial Cause No. K 23 of 1964]**

*Husband and wife — Dissolution of marriage — Foochow custom — Desertion — Maintenance — Custody of children — Chinese Marriage Ordinance.*

The petitioner left his family in Sibu and went to work in Kuching but he took no steps to set up a matrimonial home there. Subsequently the wife also left the family house and went to work as a cook at a religious association in Sibu without the petitioner's consent. The petitioner then applied for the dissolution of his marriage on the ground of desertion and asked the court for the custody of their 3 children (i.e. 2 daughters and a son). The respondent denied desertion and claimed maintenance and the custody of the 3 children.

**Held:** (1) on the facts the petitioner had failed to establish that the respondent had the intention to desert and therefore the petition must be dismissed;

(2) the petitioner should pay to the respondent and his 2 daughters $50 a month as maintenance with effect from December 31, 1964 and thereafter $50 a month at the end of each month;

(3) the son should be given to the custody and care of the petitioner and the 2 daughters in the custody and care of the respondent.

*Cases referred to:—*

(1) *Milligan* v. *Milligan* [1941] P. 78.

(2) *Pulford* v. *Pulford* [1923] P. 78, 83.

PETITION.

Parties in person.

**Lee Hun Hoe J.C.:** The parties are both of the Foochow community. They were married according to their custom on 22nd October, 1956. The marriage was registered under the Chinese Marriage Ordinance. They have three children. Two of them, both girls, are with the respondent. The youngest one, a boy, is with the petitioner.

The petitioner, a barber, prays for the dissolution of the marriage on the ground of desertion and asks the court for custody of the three children. In her answer respondent denies desertion. She does not cross petition for divorce but claims maintenance and also asks for the custody of the three children.

It seems to me that the marriage began to crack when petitioner left Sarikei for Kuching in November, 1962 after he was asked by his mother-in-law to leave the alleged partnership business. In Kuching he went into partnership with three others and operated the "Lucky Beauty Saloon" at No. 61, Main Bazaar. Respondent and the three children were left at Sungei Ensurai, Sibu to live with the families of petitioner's two brothers. Before he left for Kuching he gave respondent $150 through his uncle. Three months later he sent respondent $200. Since then he sent no more money. Respondent spoke to her mother-in-law (D.W.3) about her difficulty and informed the latter she would like to work. She was engaged as a cook at the Ming Sing Tong, Sibu, where D.W.3 had lived for over 14 years. I understand that Ming Sing Tong is a kind of religious association. On 2nd January, 1964 petitioner came to Sibu and looked for respondent. When they met a quarrel ensued. Petitioner took the youngest child back with him to Kuching. Respondent was left with the two daughters. Later respondent went to work as cook at the Ming Sing Tong, Sarikei.

D.W.3 is the petitioner's mother. She made it clear that she had never interfered with the affairs of the parties. Nevertheless she corroborated respondent's evidence to a large extent. She impressed me as an impartial and truthful witness. I have no reason to disbelieve her.

Petitioner alleged that when he went to Sungei Bidut with Ting Suk Chai (f) (P.W.2) to look for respondent he saw respondent with Sia Wee Ping (D.W.2) at the jetty. Petitioner seems to have a suspicious mind. He inferred that there was some sort of adulterous association between respondent and Sia. This allegation was not specifically pleaded. In any way I find the allegation has no substance at all. I am satisfied beyond any reasonable doubt that any suspicion on petitioner's part is unfounded and unjustified. I have seen and heard D.W.2 who incidentally is respondent's maternal uncle. He impressed me as an honest and truthful witness. I accept his evidence without hesitation.

Petitioner stated that after a quarrel respondent left him holding their baby boy. She